DEVELOPMENT BANK OF SINGAPORE LTD.

v.

ENG KEONG REALITY PTE. LTD. & ANOR.

HIGH COURT, SINGAPORE
YONG PUNG HOW J
[ORIGINATING SUMMONS NO. 1077 OF 1988]
19 MARCH 1990

CONTRACT: *Guarantee - Condition precedent - Clause in Sale and Purchase Agreement - Compensation for payment to Land Office for entering State reserve Land - Guarantee - Whether terms of guarantee fulfilled - Whether proper demand made to bank.*

LAND LAW: *Alienation - Whether there was alienation - Licence - Easement - Construction of agreement and guarantee - State Lands Act - Section 8 of the Land Titles Act [Sing].*

The plaintiffs took out this originating summons for relief by way of interpleader, seeking an order that the first and second defendants appear and state the nature and particulars of their respective claims to the sum of $170,000 securing a guarantee issued by the plaintiff and maintain or relinquish the same, and abide by such order as the Court may make.

The second defendants agreed to sell a property to the 1st defendants. The property was sold with planning approval. The planning approval carried a condition requiring the construction of an extension of a road to serve the proposed development; if the construction of the road necessitated the purchaser to enter into State reserve land, the purchaser would be required to buy the property at an agreed price from the Land Office. It was agreed by the parties that some compensation should be provided by the vendor for the purchaser should the purchaser have to make such payments.

Thus the sale agreement which was signed several days later contained a provision in clause 10 of the sale and purchase agreement for compensation up to $170,000 backed by a banker's guarantee to be paid by the vendor if the purchaser should be required to pay for the alienation of any State reserve for the purpose of the road extension.

The plaintiffs agreed to provide the guarantee on terms that the second defendants place a fixed deposit of $170,000 to secure the facilities. The second defendants complied with the requirement and the plaintiff issued a letter of guarantee in favour of the first defendants.

The guarantee provided *inter alia* that, the guarantee would be effective from 15 October 1987 to 14 April 1988 and was conditional upon a claim being made in writing and received by the plaintiffs on or before the expiry date, and thereafter the guarantee would automatically cease to have any effect whatsoever whether or not it was returned to the plaintiff for cancellation.

Through correspondences from both the first and second defendants the plaintiffs received conflicting instructions.

During the hearing of the originating summons, the 1st defendants contended that a license had been created and that this licence created an easement. The licence was granted more than 14 months after the guarantee expired on 14 April 1988. It was further contended by the first defendants that the plaintiffs and the second defendants became liable when the Land Office informed the first defendants on 11 April 1988 that a fee would be payable, and that the letter from the first defendants' solicitors dated 12 April 1988 was a sufficient "calling" on the bank to pay and as such was a valid claim under the guarantee.

The second defendants contended that the first defendants had merely applied to the Land Office for a licence and that a grant for a licence was a very different matter to an alienation of land.

Held:

[1] In Singapore, all land ultimately belongs to the State and in the context of the instant case, the term "alienation" could not have meant anything other than an alienation by the State.

[2] The granting of the licence to enter upon the State reserve merely saved the entry from being a trespass, and did not constitute an 'alienation' within the meaning of that term as stated in the guarantee. Since there had been no alienation, no demand could be made under the guarantee.

[3] Since no valid demand had been made under the guarantee before the expiry date of 14 April 1988, the first defendants were no longer entitled to any payment under the guarantee, and the second defendants were entitled to the release to them of the sum of $170,000 placed by them with the plaintiffs to secure the guarantee together with interest thereon.

[Order accordingly.]

Cases referred to:

McDonald v. Peddle [1923] NZLR 987 SC
Re Salvin's Indenture, Pitt v. Durham County Water Board [1938] 2 All ER 498
National House-Building Council v. Fraser & Anor. [1983] 1 All ER 1090
Bunbury Foods Pte. Ltd. & Anor. v. National House Bank of Australasia Ltd. & Anor. [1984] 58 ALJR 199
O'Day v. Commercial Bank of Australia [1933] 50 CLR 200
In re Gaskell and Walters' Contract [1906] 2 Ch 1
Dow Banking Corporation v. Mahakh [1983] 2 Lloyd's Rep 561

Legislation referred to:

Land Titles Act (Cap 157) [Sing], s. 8

For the first defendants - Edison Foo with Christina Lee; M/s. Wong & Lim
For the second defendants - Cheong Yuen Hee & Lai Swee Fung; M/s. Toh Tan & Partners

JUDGMENT

Yong Pung How J:

This originating summons was taken out by the plaintiffs The Development Bank of Singapore Limited for relief by way of interpleader, seeking an order that the first defendants Eng Keong Realty Pte. Ltd. and the second defendants Chan Ban Seng Development (S) Pte. Ltd. appear and state the nature and particulars of their respective claims to the sum of $170,000 securing a guarantee issued by the bank, and maintain or relinquish the same, and abide by such order as the Court may make.

On 22 July 1987, the second defendants entered into a written agreement of sale to sell to the first defendants a property known as Lot 116-143 and Lot 3532 (itself an amalgamation of Lots 116-140 and 3332) both of Mukim 22 for $1,620,000. The property was sold with planning approval for the development of 7 units of 2-storey terrace houses. The planning approval carried a condition requiring the construction of an extension of the road known as Leith Park to serve the proposed development. Accordingly clause 10 of the agreement provided as follows:

10. The purchaser is aware that a condition in the said planning approval requires the vendor to construct the extension of the road "Leith Park" to serve the proposed development. The purchaser shall not be required to procure the alienation of the adjacent State reserve for the construction of the said road extension and it is hereby agreed that the said planning approval itself provides for the said road extension within the confines of the property without involving any other adjacent plot or plots of State reserve. The purchaser shall have a period of up to 6 months after the date of completion to ascertain that no alienation of State reserve is required and during this period the vendor shall maintain a banker's guarantee in favour of the purchaser up to the limit of Dollars One hundred and seventy thousand ($170,000) guaranteeing payment of up to the said sum of $170,000 to the purchaser in the event the purchaser is required to pay for the alienation of any State reserve for the purposes of said road extension.

Following this, on or about 5 October 1987, the second defendants applied to the plaintiffs to issue on their behalf a letter of guarantee in favour of the first defendants. As this involved the provision of facilities by the plaintiffs to the second defendants, the guarantee was to be issued upon the terms of the second defendants placing with the plaintiffs a fixed deposit of $170,000 to secure these facilities. Pursuant to this application and in consideration of the request and an indemnity provided by the second defendants to the plaintiffs, and a fixed deposit of $170,000 placed by the second defendants with the plaintiffs, the plaintiffs issued a letter of guarantee numbered as LGO176787 for $170,000 ("the guarantee") in favour of the first defendants.

The guarantee included the following express terms which are relevant to these proceedings:

(a) the plaintiffs guaranteed payment to the first defendants upon written demand from the first defendants of all or any such sum or sums of money that the first defendants had paid or were called upon to pay in respect of the alienation of any State reserve for the purposes of constructing the extension of the road "Leith Park" to serve the development of 7 units of 2-storey terrace houses on the lands described in the agreement of sale dated 22 July 1987 made between the first and second defendants;

(b) the written demand from the first defendants would constitute sufficient evidence that moneys demanded by the first defendants were due and payable by the plaintiffs without further enquiry;

(c) the plaintiffs' liability under the guarantee would be limited to $170,000;

(d) the guarantee would be effective from 15 October 1987 to 14 April 1988 and was conditional upon a claim being made in writing and received by the plaintiffs on or before the expiry date, and thereafter the guarantee would automatically cease to have any effect whatsoever whether or not it was returned to the plaintiffs for cancellation.

By letter addressed to the plaintiffs dated 12 April 1988, the solicitors for the first defendants informed the plaintiffs that the Land Office was working on the amount that was payable by the first defendants, and enclosed a copy of a letter from the Land Office to the first defendants' architects dated 11 April 1988. The contents of the 2 letters are set out below:

12 April 1988

DBS Bank
Bills & Remittances Department
Singapore

Dear Sirs

Proposed Erection Of 7 Units Of 2 Storey Terrace House At Leith Park Banker's Guarantee

We refer to the guarantee which you have executed in favour of our clients, M/s Eng Keong Realty Pte. Ltd. in respect of payment for the alienation of the State reserve for the construction of an access road to serve the above development.

We have been instructed by our clients to inform you that a consideration fee is payable for the above alienation and we enclose a copy of a letter from the Commissioner of Lands dated 11 April 1988 for your information.

We are instructed that the land office is working on the amount that is payable by our clients and upon hearing from them we shall revert to you.

Please acknowledge receipt.

Yours faithfully
Sdg. Wong & Lim

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11 April 1988

M/s Archi-Build Integrated
21 Middle Rd
#02-00 Hua Bao Building
Singapore 0718

Dear Sir

Proposed Erection Of 7 Units Of 2 Storey Terrace House On Lots 116-143, 116-140 & 3332 Mukim 22 At Leith Park

Please refer to your letter dated 31 March 89.

2. Please note that a consideration fee is payable for the issue of a licence to enter and construct an access road on the State reserve marked red on your plan.

3. Your clients' application is meanwhile being processed. We will revert to you as soon as possible.

Yours faithfully

Sgd:

Rajnikant Shah
for Commissioner of Lands

On 27 April 1988, the second defendants' solicitors wrote to the plaintiffs putting them on notice not to make any payment under the guarantee. They contended in effect that the first defendants' solicitors' letter dated 12 April 1988 could not constitute a claim under the terms of the guarantee, and accordingly that the first defendants had not made their claim to the plaintiffs on or before 14 April 1988 as required under the guarantee. Further, the second defendants requested the plaintiffs to release to them the fixed deposit of $170,000 pledged by them to the plaintiffs as security for the issuance of the guarantee.

As the plaintiffs were receiving conflicting instructions and adverse claims from the solicitors respectively acting for the first defendants and the second defendants, they took out the originating summons for relief by way of interpleader. The plaintiffs claimed no interest in the moneys in dispute other than as security for the guarantee and for related charges, did not collude with either the first or the second defendants, and were ready and willing to pay into Court or to pay or dispose of the said moneys as the Court might direct.

On 13 March 1989 the plaintiffs obtained an order of Court directing that the first and second defendants proceed to the hearing of the originating summons in respect of their competing claims, in which the first defendant should be the plaintiffs and the second defendants should be the defendants.

At the hearing before me of the originating summons on 10 January 1990 the only witness called by the first defendants was one Goh Soon Keat, a property agent. He had been approached originally by the second defendants in the first week of July 1987 to find a purchaser for the property in question, but had then acted for the first defendants in the purchase, and had drafted the agreement of sale. He had realised that the purchaser might have to go into the State reserve to build a road for the development. From his previous experience of a similar situation, he knew that in such a case the purchaser would probably have to pay the Land Office the market value of so much of the State reserve as was required. Since it might not be advisable for the purchaser to buy the property at the agreed price, if he had also to pay for access to the State reserve, it was agreed by the parties during negotiations that some compensation should be provided by the vendor if the purchaser should have to make payment. Thus, the sale agreement which was signed several days later on 22 July 1987 contained a provision in clause 10 for compensation up to $170,000 backed by a banker's guarantee to be paid by the vendor if the purchaser should be required to pay for the alienation of any State reserve for the purpose of the road extension.

The first defendants' case, together with the authorities cited in argument, was that a licence was eventually granted on 23 June 1989. This licence created an easement: *McDonald v. Peddle* [1923] NZLR 987 SC: *Re Salvin's Indenture, Pitt v. Durham County Water Board* [1938] 2 All ER 498. This easement would continue until such time as the Director-General of Public Works took over the land as a public street. The term "alienation" was capable of a broader meaning which would include the case of an easement created by the licence. Although the licence was only granted on 23 June 1989, and therefore more than 14 months after the guarantee expired on 14 April 1988, the guarantee could still be operative after the expiry of the period: *National House-Building Council v. Fraser & Anor.* [1983] 1 All ER 1090. Under the guarantee the first defendants could make a general demand and furnish the actual amount later: *Bunbury Foods Pte. Ltd. & Anor. v. National Bank of Australasia Ltd. & Anor.* [1984] 58 ALJR 199; *O'Day v. Commercial Bank of Australia* [1933] 50 CLR 200. The bank and the second defendants became liable when the Land Office informed the first defendants on 11 April 1988 that a fee would be payable, and the letter from the first defendants' solicitors dated 12 April 1988 was a sufficient "calling" on the bank to pay and was a valid claim under the guarantee.

The second defendants contended that the claim by the first defendants to payment under the guarantee must fail, because clause 10 of the sale agreement contained a condition precedent that the first defendants must have been required to pay for the alienation of some State reserve within the period provided in the guarantee before the guarantee could be called on. Instead of being required to acquire State reserve by alienation, the letter from the Land Office dated 11 April 1988 showed that the first defendants had actually applied to the Land Office for only a licence, which was being processed, and a grant of a licence was a very different matter to an alienation of land. Alienation is when property is given by the State or by some other grantor: *In re Gaskell and Walters' Contract* [1906] 2 Ch l. The first defendants had not applied, and had not "paid" or "been called upon to pay", for any State reserve as provided for in the guarantee. The letter from the first defendants' solicitors of 12 April 1988 purported to give the bank notice that a demand would be made under the guarantee in due course but, in fact, the first defendants could not make any such demand. If the first

defendants' solicitors' letter of 12 April 1988 could be considered the demand, the demand which they made was not in a valid form because the amount of the demand was not either known or ascertainable: *Dow Banking Corporation v. Mahakh* [1983] 2 Lloyd's Rep 561. In view of the careful wording of the guarantee, the defective demand could not be saved by the subsequent letter of 28 June 1988.

In this case, the rights of the parties were governed by the sale agreement of 22 July 1987. Under clause 10 of this agreement, the first defendants could only have obtained payment under the guarantee for moneys that they had paid or had been called upon to pay in respect of the alienation of any State reserve, up to the limit of $170,000. Alienation is necessarily limited to the transfer of ownership of property. As was said by Cozens-Hardy LJ *In re Gaskell and Walters' Contract* at p. 10, it "implies a transaction by which property is given to another person". This has always been its meaning from the earliest times in English land law from which much of our own land law is derived. As early as 1285 the Statute Quia Emptores recognised alienation of a fee simple by substitution of a new tenant for an old but forbade future subinfeudation. *Coke on Littleton*, the first of Coke's four great books, referred in 1628 to alienation as the transferring of property to another.

In Singapore, all land ultimately belongs to the State, and, in the context of the instant case, the term could not have meant anything other than an alienation by the State. Dealings with State lands are governed by the State Lands Act (Cap 314), the long title of which describes it as "An Act to regulate the alienation and occupation of State lands". When State land is alienated, s. 8 of the Land Titles Act (Cap 157) provides for the issue of certificates of title to the grantee:

> 8(1) When after the commencement of this Act any person has become entitled to land upon alienation by the Crown or the State for an estate in fee simple, or for an estate in perpetuity, or for a leasehold term of not less than 21 years, the Collector of Land Revenue shall furnish to the Registrar a certificate to that effect, and the Registrar shall thereupon bring the land under the provisions of this Act as hereinafter directed and shall deliver the duplicate certificate of title to the person entitled thereto.

Although the guarantee under the sale agreement specifically provided for compensation to be payable only if land was alienated, the first defendants, for some reason which is not known, only applied for a licence to enter upon the State reserve. Even if the licence would create an easement, it would confer upon the first defendants no proprietary or possessory right in the State reserve affected. The granting of the licence to enter upon the State reserve merely saved the entry from being a trespass, and did not constitute an alienation within the meaning of that term as stated in the guarantee. Since there had been no alienation, no demand could be made under the guarantee. Since no valid demand had been made under the guarantee before the expiry date on 14 April 1988, the first defendants were no longer entitled to any payment under the guarantee, and the second defendants were entitled to the release to them of the sum of $170,000 placed by them with the plaintiffs to secure the guarantee together with any interest thereon.

Accordingly I dismissed the first defendants' claim and gave judgment for the second defendants, with costs to include the costs of the plaintiffs.

Also found at [1990] 1 CLJ 1290